

## EASTERN DISTRICT OF CALIFORNIA

) 1:05cv0380 AWI DLB  
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) FINDINGS AND RECOMMENDATION  
) REGARDING PLAINTIFF'S MOTION FOR  
) ENTRY OF DEFAULT JUDGMENT  
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Plaintiff Fidelity and Guaranty Life Insurance Company (“Plaintiff”) filed the instant motion for entry of default judgment on December 23, 2005. The matter was heard on February 3, 2006, before the Honorable Dennis L. Beck, United States Magistrate Judge. Linda Oliver appeared on behalf of Plaintiff. There was no appearance on behalf of Defendant John H. Sykes (“Defendant”). The matter was submitted for findings and recommendation to the District Court judge.

## BACKGROUND

\_\_\_\_\_Plaintiff filed this complaint for declaratory relief on March 18, 2005, requesting that the Court declare that Defendant is owed no sums under the life insurance policy insuring the life of John L. Hart (“Hart”).

On or about May 11, 2004, Plaintiff issued a certificate of life insurance, Certificate No. L0079124, on Hart's life in the amount of \$150,000. Defendant is the named beneficiary. Hart

1 died on June 29, 2004, as a result of a homicide. Plaintiff contends that no benefits are due under  
2 the policy because Defendant lacked any insurable interest in the life of Hart for the following  
3 reasons: (1) the evidence shows that Hart did not sign the application for insurance; and (2) there  
4 were multiple misrepresentations on the application for insurance.

5 On March 28, 2005, Plaintiff filed a certificate of service showing that service of  
6 summons and complaint was made on Defendant on March 23, 2005.

7 On April 19, 2005, Defendant filed a consent to jurisdiction of the United States  
8 Magistrate Judge. Defendant has not answered the Complaint or otherwise communicated with  
9 the Court since the April 19, 2005, filing.

10 Plaintiff filed a motion for entry of default on June 3, 2005. The Clerk of the Court  
11 entered default on August 31, 2005.

12 Plaintiff filed the instant motion on December 23, 2005. Defendant has not filed an  
13 opposition.

#### 14 DISCUSSION

15 Rule 55(b) of the Federal Rules of Civil Procedure provides that judgment by default may  
16 be entered as follows:

17 (1) By the Clerk. When the plaintiff's claim against a defendant is for a sum  
18 certain or for a sum which can by computation be made certain, the clerk upon  
19 request of the plaintiff and upon affidavit of the amount due shall enter judgment  
for that amount and costs against the defendant, if the defendant has been  
defaulted for failure to appear and if he is not an infant or incompetent person.

20 (2) By the Court. In all other cases the party entitled to a judgment by default  
21 shall apply to the court therefor; but no judgment by default shall be entered  
22 against an infant or incompetent person unless represented in the action by a  
23 general guardian, committee, conservator, or other such representative who has  
24 appeared therein. If the party against whom judgment by default is sought has  
25 appeared in the action, the party (or, if appearing by representative, the party's  
26 representative) shall be served with written notice of the application for judgment  
27 at least 3 days prior to the hearing on such application. If, in order to enable the  
28 court to enter judgment or to carry it into effect, it is necessary to take an account  
or to determine the amount of damages or to establish the truth of any averment  
by evidence or to make an investigation of any other matter, the court may  
conduct such hearings or order such references as it deems necessary and proper  
and shall accord a right of trial by jury to the parties when and as required by any  
statute of the United States.

1 “Upon default, the well pleaded allegations of the complaint relating to liability are taken  
 2 as true.” Dundee Cement Co. v. Highway Pipe and Concrete Products, 722 F.2d 1319, 1323 (7th  
 3 Cir. 1983); Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Thus, “[a]t  
 4 the time of entry of default, the facts alleged by the plaintiff in the complaint are deemed  
 5 admitted.” 10 J. Moore, Moore's Federal Practice §55.11 (3d ed. 2000).

6 Plaintiff requests that the Court enter a default judgment against Defendant declaring that  
 7 he is owed no sums under the policy at issue. Under California law, “a false representation or a  
 8 concealment of facts whether intentional or unintentional, which is material to the risk, vitiates  
 9 the policy. The presence of an intent to deceive is not essential.” *Belford v. New York Life Ins.*  
 10 *Co.*, 9 Cal.2d 103, 105 (1937); Cal.Ins. Code § 331. Accordingly, an insurer is allowed to  
 11 rescind insurance coverage when it can be shown that an insured made material  
 12 misrepresentations in an application for insurance. Cal. Ins. Code § 359; *Burns v. Prudential*  
 13 *Life Ins. Co.*, 201 Cal.App.2d 868, 869-70 (1962). Misrepresenting or concealing facts related to  
 14 an applicant’s health history in an application for insurance is highly material to the risk and  
 15 makes the policy void *ab initio*. See *Belford*, 9 Cal.2d at 105; *Old Line Life Ins. Co. of America*  
 16 *v. Superior Court*, 229 Cal.App.3d 1600 (1991).

17 According to the Complaint, the application was purportedly signed by Hart and  
 18 Defendant. Defendant represented that he was Hart’s grandfather, that Hart had never sought or  
 19 received treatment for the use of any drugs, and that Hart was a student at Fresno City College.  
 20 On June 29, 2004, Hart died in San Francisco, California, as the result of multiple sharp force  
 21 injuries. Plaintiff commenced a routine review and learned that Hart had two other life insurance  
 22 policies that were not disclosed on the application, that Defendant was not Hart’s grandfather and  
 23 was not related to Hart at all, that Defendant had not been ruled out as a suspect in Hart’s murder,  
 24 that the signature on the application was not Hart’s signature, and that the person who applied for  
 25 insurance was not Hart. Plaintiff also learned that Hart did not live with Plaintiff in Fresno, as  
 26 represented on the application, that Hart was not a student at Fresno City College, and that Hart  
 27 received treatment for panic attacks as a result of smoking marijuana in December 2000.  
 28 Complaint, ¶¶ 4-12.

1 Counsel for Plaintiff indicates that she wrote Defendant a letter on May 20, 2005, to  
2 request that he respond to the Complaint. Declaration of Linda B. Oliver ("Oliver Dec."), ¶ 5,  
3 Exhibit C. Counsel also spoke to Defendant by telephone on May 24, 2005, and he told her that  
4 he did not intend to participate in the action. Oliver Dec., ¶ 6.

5 Defendant is not an infant or an incompetent person, and is not in the military service or  
6 otherwise exempted under the Soldiers' and Sailors' Civil Relief Act of 1940. Oliver Dec., ¶¶ 7,  
7 8.

8 Based on the above, the Court finds that Plaintiff's motion for entry of default should be  
9 granted. The Court should enter judgment that Defendant is owed no sums of money under the  
10 certificate of life insurance, Certificate No. L0079124.

11 **RECOMMENDATION**

12 For the reasons discussed above, the Court RECOMMENDS to:

- 13 1. GRANT Plaintiff's motion for entry of default judgment in favor of Plaintiff and  
14 against Defendant;
- 15 2. Enter judgment declaring that John J. Sykes take nothing under life insurance  
16 certificate number L0079124, issued by Fidelity and Guaranty Life Insurance  
17 Company on the life of John L. Hart on or about May 11, 2004.

18 This Findings and Recommendation is submitted to the Honorable Anthony W. Ishii,  
19 United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B)  
20 and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern  
21 District of California. Within thirty (30) days after being served with a copy, any party may file  
22 written objections with the court and serve a copy on all parties. Such a document should be  
23 captioned "Objections to Magistrate Judge's Findings and Recommendations." The Court will

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1 then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). The parties are  
2 advised that failure to file objections within the specified time may waive the right to appeal the  
3 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 IT IS SO ORDERED.

5 **Dated: February 3, 2006**  
6 3b142a

**/s/ Dennis L. Beck**  
UNITED STATES MAGISTRATE JUDGE